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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1945.

## No. 250

CORNELIUS J. COLLINS, et al.,
*Petitioners,*

vs.

LESTER L. SEIFRIED,
*Respondent.*

SHERIDAN VIEW BUILDING CORPORATION,
*Debtor.*

**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.**

**BRIEF IN OPPOSITION THERETO.**

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*To The Honorable, The Chief Justice And Associate Justices Of The Supreme Court Of The United States:*

Counsel for Respondent, Lester L. Seifried, respectfully show this Court the following reasons why a Writ of Certiorari should not be issued to the United States Circuit

Court of Appeals for the Seventh Circuit to review an order of that Court entered on June 6, 1945, reversing an order of the United States District Court for the Northern District of Illinois, Eastern Division, entered January 5, 1945.

No ground for Certiorari under Rule 38.

*Introductory.* The issue before this Court on the Petition for Certiorari is very simple. We do not think the Petitioners or counsel for the Securities and Exchange Commission have come within the requirements of Rule 38 (5) on the subject of certiorari. No "special and important reasons," Rule 38 (5), have been suggested, and none can be, for none exist; and the Circuit Court of Appeals did not decide a "federal question in a way probably in conflict with applicable decisions of this Court," Rule 38 (5) (b).

The Circuit Court of Appeals held against the Petitioners because they failed to observe or comply with certain elementary requirements of pleading and proof under Chapter X of the bankruptcy act. The grounds of the decision are clearly and concisely stated by Judge Kerner, as follows:

> "In the case before us the petition did not allege the specific facts showing the need for relief and that it was reasonable to suppose that a plan of reorganization could be effected, nor was there any proof tending to establish such facts. The court was not warranted in assuming without more that the state foreclosure proceeding was inadequate to protect petitioners' interests. *Marine Harbor Properties, Inc.* v. *Manufactureers Trust Co., supra,* 88. Neither was there any evidence of the debtor's financial history, its earning capacity, past, present, or prospective, and when appellant offered to prove that the fair market value of

the property was $171,000, that is, $55,800 less than the first and junior indebtedness, appellee objected and the court sustained the objection."

It is respectfully submitted that the rules stated by the Circuit Court of Appeals as the basis for its holding are universally accepted as correct in all circuits and in this Court. *Marine Harbor Properties, Inc.* v. *Manufacturers Trust Co.*, 317 U. S. 78, 86; *Fidelity Assurance Association* v. *Sims*, 318 U. S. 608; *In re Western Tool Mfg. Co.* (1944), 142 Fed. (2d) 404.

The Court said in the *Marine Properties* case that the "Burden (rests on the petitioner to make the showing required by Section 130 (7) and Section 146 (4)" of the bankruptcy act and that the District Court was not warranted "in assuming" the existence of facts which Congress required to be shown before the Court will retain jurisdiction under Chapter X, over the objection of creditors duly and properly interposed. This burden the Petitioners, as pointed out by Judge Kerner, did not even attempt to discharge either by suitable pleadings or competent proof. This proof on their part requires a dismissal of the Petition *in any Court.*

While we believe the absence of merit in the Petition for the writ is so obvious that we would be justified in ending our brief in oppostion here, we do not wish to seem disrespectful of counsel for the Petitioners or the Commission and their presentation by ignoring their argument in too summary a fashion. We shall, therefore, analyze and briefly comment upon the Petition and the supporting memoranda filed by counsel for the Petitioners and for the Commission.

## BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

### I. Reply to Petitioner's Brief.

#### 1. *Question Misstated by Counsel*

Two Briefs or Memoranda have been served in this proceeding, one by Petitioners, which is printed, and another in typwritten form by the Securities and Exchange Commission as *Amicus Curiae* in support of the Petition for the Writ. For brevity and convenience we shall refer to the memorandum we are discussing as "Petitioners' " or "Commission," respectively. The pagination of the printed and typed copies of the Commission Memorandum may not correspond. Our page references to the Commission's Memorandum are necessarily to the typed copy.

We think the Petitioners and the Commission erroneously state the question before the Circuit Court of Appeals. In the statement of the question on p. 2, the Commission says that the question is whether

> "a Chapter X Bankruptcy Proceeding must be dismissed in favor of a recently instituted prior proceeding affecting the debtor * * *"

Petitioners on p. 2 state the question in substantially the same narrow and erroneous form. As stated by the parties, the impression is conveyed that the *only* question before the Circuit Court and the District Court was whether a "prior proceeding" adequately protected the interests of all creditors. Such was not the case. On p. 2 of this brief we have quoted from the opinion of Judge Kerner

of the Circuit Court of Appeals the grounds on which the decision of that Court was made. It there appears that that Court reversed the District Court because the petition for reorganization did not allege specific facts showing need for relief and that it was reasonable to suppose that a plan of reorganization could be effected, nor did the Petitioners offer any proof tending to establish such facts. The Court also held that the District Court was not warranted in assuming without proof that the state foreclosure proceeding was not adequate to protect Petitioners' interests. It is obvious, therefore, that the District Court was reversed because, as we state on p. 15 of this brief, the Petitioners failed to comply with certain elementary requirements of pleading and proof under Chapter X of the Bankruptcy Act, recognized as binding in all courts.

Moreover, the Commission indulges in a strange, because wholly indefensible, assumption of fact. In the purported statement of the question before the Court, the Commission *assumes* a clash of interests "within the class and indication that the particular reorganization" may be inequitable. There are two gratuitous assumptions involved in this statement: one, that there is a clash of interests, which is not correct; and secondly, that there was a "particular reorgonization" before the District Court or before the Circuit Court, which is not true. No plan of reorganization was even suggested in the District Court, and of course not in the Circuit Court; there was not even a hint in the testimony or in the Petition in the District Court that a reorganization was possible. The entire argument of both parties which follows is addressed to and based on this materially incorrect statement of the question before the Court.

### 2. *Petitioners' Statement*

In most essential particulars, the statement in the brief of the Commission is open to the same criticism for inaccuracy and omission of material matters as is the statement of counsel for the Petitioners. In one respect, however, the brief of the Commission differs in the statement from that of the Petitioners, namely, the Commission has abandoned its colleagues, counsel for the Petitioners, on the point that the Respondents, Seifried and his co-owner of the bonds, Howard F. Bishop, are fiduciaries. Obviously the point was and is wholly without merit.

### 3. *"Reasons for Granting the Writ"*

On pp. 8-9 Petitioners set forth the reasons why they think a writ should be granted. These reasons, as expressed or implied, may be summarized under the following points.

(a). Although an indenture truste may act to forclose in behalf of all bondholders in order to protect their interest, under an indenture securing all bonds of a certain issue without discrimination, where bondholders are not given notice of such proceeding to foreclose, such security holders are *prima facie* not adequately represented by the indenture trustee, where each bondholder or any group of bondholders do not "have an absolute right of intervention." p. 8.

*Reply.* The claim that "minority" bondholders had no notice of the state court proceeding and were not represented is without the slighest merit on the facts, for they were in fact and in law represented by the indenture trustee, and had notice through the indenture trustee which

acted for them. Against this trustee no hint of fraud has been offered. In *Shaw* v. *Railroad Co.*, 100 U. S. 605, at p. 612, the Court said:

> "The trustee represents the mortgage, and in executing his trust may exercise his own discretion within the scope of his powers. If there are differences of opinion among the bondholders as to what their interests require, it is not improper that he should be governed by the voice of the majority acting in good faith and without collusion, if what they ask is not inconsistent with the provisions of the trust."

Not only was the request that the trustee commence foreclosure proceedings consistent with the terms of the trust, but it was expressly stipulated that 51% of the bondholders could direct the commencement of such proceedings. Speaking of notice, the majority bondholders were given no notice of proceedings under Chapter X.

(b) Where a group of such bondholders as have been described in (a) above, holding not over $5700, or less than 2½%, of the issue secured, proceed, or let themselves be persuaded to proceed, under Chapter X in the District Court, "a conflict exists between bondholders."

*Reply.* It seems to be suggested that since three bondholders could be persuaded to file a petition under Chapter X, there is some sort of a "conflict" and the decision in *Marine Harbor Properties, Inc.* v. *Manufacturer's Trust Co.* does not apply. The reasoning in support of this proposition is involved and obscure, but it leads unavoidably to the result that in *every* case where three creditors with sufficient claims file a petition under Chapter X against a debtor which has pending against it a proceeding in another court, these creditors somehow become privileged under the law and do not need to bear the normal burden of pleading and proof in a Chapter X proceeding. They do not, it seems, have the burden to show the

usual statutory grounds for taking and retaining jurisdiction, such as reasonable possibility of successful reorganization [Secs. 130, 146 (3)] and that the pending state proceeding will not adequately protect creditors [Sec. 146 (4)]. There is no such law, rule or doctrine, and the notion is exactly the contrary of what the courts have held and Congress intended. The requirement of good faith in Chapter X cannot be brushed aside merely because creditors are not unanimous in their views on the best forum or procedure.

(c) Mr. Bishop is called a "dominant bondholder"—he with Seifried held 66% of the bonds—and it is said that he "was a fiduciary, and as such, his personal interest was antagonistic to the interest of minority bondholders"; the "fiduciary" character of Mr. Bishop's position seems to arise from the fact that he and Mr. Seifried became majority bondholders and thus, as it is hinted, displaced the true fiduciary, the indenture trustee. P. 8.

*Reply.* This is a non-sequitur, for just because two persons—Mr. Bishop and the respondent—become majority holders does not give rise to "antagonistic" interest, unless as a matter of law the majority is always in antagonism with the minority. This is absurd, of course, and no court has ever so held when, as here, an indenture trustee stands indifferently the representative of *all* security holders. Mr. Bishop is no more a fiduciary than any majority potentially is. Plainly the majority of *shareholders,* with voting and policy making powers, may find themselves in the position of a fiduciary, but not so here where all *bondholders* are protected by one instrument and the trustee is bound by contract, by equitable principles and by common morality to act impartially for all, singly

and collectively. The statement of this Court in *Shaw* v. *Railroad Co.*, 100 U. S. 605, 612, quoted above, negatives this contention completely. The fiduciary here was the trustee, and he was not, could not be, and it is not claimed that he was displaced as such fiduciary by a bondholder or by bondholders.

(d) The majority of the bondholders had the right to remove the trustee, although they did not at any time threaten or attempt to exercise this power. P. 8.

*Reply.* Well, what of it? They cannot remove the trustee now, since they have asked it to start foreclosure proceedings.

(e) The minority bondholders (less than 2½%) can be protected only "in the federal court." P. 8.

*Reply.* This begs the question. The Circuit Court rightly held that the Petitioners had failed to discharge the burden on them in this behalf.

(f) The District Judge, say Petitioners, "took judicial notice"' of everything necessary to give him the power to approve the petition, although on certain statutory prerequisites no foundation was laid by factual allegations in the petition, nor was the deficiency supplied by actual proof. P. 9.

*Reply.* This proposition assumes to set aside the bankruptcy act, which requires that certain facts be *alleged* and *proved* (Secs. 130, 146), before the Court may take and retain jurisdiction in a reorganization proceeding when objection is timely and properly made.

(g) "Why does Bishop, said fiduciary * * * resist so vigorously the jurisdiction of the Federal Court?" P. 18.

*Reply.* Mr. Bishop is not a party to this proceeding. The record shows that he is merely interested as a co-owner of securities. He had a right to believe that his interests as a creditor would be adequately subserved in the proceeding in the state court with less delay and less expense. That is what nearly 98% of all creditors and security holders of the debtor seemingly think. This large group has a right to feel as it does and to prefer the state court procedure. The burden is on the 2% to show that the 98% are mistaken, and this they have failed to do, as the Circuit Court correctly holds.

Petitioners' memorandum argument is a rehash of their arguments in the Circuit Court, including the errors. We shall not take the time of this Court in answering each argument advanced. Counsel simply refuse to recognize the state procedure for reorganization under Sec. 90 of the Corporation Act of the State of Illinois and the general equity powers of the state court. This statute is quoted in Appendix A. A notable illustration appears on p. 16 of their Petition and Brief, where this gem occurs:

> "7. The court cannot compel the acceptance of a plan of reorganization nor to bind the dissenters to a plan of reorganization."

We cannot answer this one otherwise than by referring to Sec. 90 above, Appendix A and Appendix B, which show the exact contrary to be the law in Illinois.

Again, on p. 15, the theory of the upset-price in the state procedure is criticised. We answer this here, as we did below, by citing Sec. 216 (10) of the bankruptcy act, where the court is directed to sell the property "at not less than a fair up-set price." These are fair illustrations of criticisms against the adequacy of the state proceeding, all of which are captious, ill-informed, or both.

### 4. *Adequacy of State Proceeding.*

It is asserted by Petitioners and the Commission that *Marine Harbor Properties, Inc.* v. *Manufacturer's Trust Co.*, 317 U. S. 78, 88, was misapplied; but there this Court said:

> "In view of the burden on a petitioner to make the showing required by 130, paragraph (7) and 136, paragraph (4), the bankruptcy court is not warranted in assuming without more that a state foreclosure proceeding instituted for and on behalf of the first mortgage creditors exclusively is inadequate. * * *"

It is settled in this Court that the burden to prove the inadequacy of the state proceeding is on the Petitioners; the objecting creditor is not required, in the first instance, to prove its adequacy. Petitioners insist that this Court now change this rule. In view of the claim that the state proceeding affords insufficient protection to creditors and that the District Court could take "judicial notice" of that alleged fact, we quote in Appendix A the applicable State statute, and in Appendix B from our Reply Brief in the Circuit Court the portion thereof which contains the Illinois law on the powers and duties of equity in a reorganization proceeding.

## II.

## Reply to Commission Memorandum.

### *Grounds of Decision in Circuit Court Incorrectly Stated.*

What we have to say in what follows is inspired solely by the contents of the Brief of the Commission as *Amicus Curiae*. We propose, however, to discuss this document frankly. In no other way can we discharge our duty to

this Court and to our client. The Commission begins by assuming and asserting, as we have pointed out in the case of the Petitioners, in their initial statement of the question that the issue is substantially narrower than in point of fact the record shows it to be, and then argues as if this too narrowly stated issue were the only question before the Court. The Commission says on p. 7 that the interpretation of Sec. 146 (4) makes the power of the Court to take and retain jurisdiction in a reorganization proceeding, where a prior proceeding is pending in a state court, depend upon "the outcome of a race of diligence." This straw man, R. O. Diligence, was paraded before the Circuit Court, and now an attempt is made to infuse the breath of life into his nostrils in this Court.

We cannot understand how lawyers familiar with the record could thus misinterpret it. The Circuit Court simply held that on this one point, among others in the case, the Petitioners in the District Court had failed to carry the burden of proof which the statute puts upon them and which this Court in the case of *Marine Harbor Properties, Inc.* v. *Manufacturer's Trust Co.*, 317 U. S. 78, 86, said rested upon them, namely to offer some evidence in the District Court, tending to show that the state proceeding inadequately protected the rights and interests of the Petitioners and creditors. No such fact was alleged and no proof of such fact was tendered in the District Court. The holding of the Circuit Court on this point is in exact keeping with the Federal statutes and the decisions of this Court.

Still working the straw man, counsel say that the effect of the holding of the Circuit Court is to repeal *pro tanto* Sec. 256 of Chapter X of the Bankruptcy Act. Pp. 7-8. This suggestion is, of course, completely preposterous. The

holding of the Circuit Court does not in any way, directly or indirectly, affect or concern Sec. 256; under that section a meritorious petition may be filed by qualified creditors upon pleading and proving the facts required by Secs. 130 and 146 of Chapter X.

Petitioners (p. 4) and the Commission (p. 4) pointedly refer to the fact that the Respondent paid $68.00 for the bonds he bought, although the bonds had a par value of $100.00. It is intended to create the impression that there was something unfair, underhanded, if not actually fraudulent, in this transaction. First we note that some of the Petitioners themselves paid only an average of $66.8 for these bonds. Petitioner-witness Caswell, himself a dealer in securities, testified that he paid 62 (Rec. 52) for some of the bonds he purchased and 69¾ for some. This Petitioner claimed to own $2100.00 face value of the securities which are listed to qualify the Petitioners. Helen Milis was listed as owning $300.00 and signed the petition, but testified that she never owned any (R. 5, 52, 54). Counsel for the Respondent have not pressed this obvious irregularity involving a misrepresentation as to the ownership of bonds by a Petitioner, an irregularity which, had it occurred on the side of the Respondent, would doubtless have been exploited to the limit. We make no point concerning the price paid for the bonds by either side, but in closing the discussion of this point raised by the Petitioners and the Commission, we call attention to the fact that the price paid by the Respondent was probably higher than the independent appraisal warranted (R. 119). Misstatements and insinuations on these points were made in the Circuit Court, were there, as here, corrected by us (Reply Brief, 22, 23)), but like Banquo's Ghost, they will not down.

On P. 6 the Commission tells this Court that the Circuit

> "Court reversed the order of the district judge *on the ground* that the petitioners had not established the inadequacy of the state proceeding for the protection of their interests * * * "

The statement quoted from the brief of the Commission is in keeping with the erroneous statement of the issue before the Court, to which we have adverted in discussing Petitioners' brief (page 4 *ante*), and we merely refer this Court to the quotation from Judge Kerner's opinion on p. 2 of this brief in opposition. This concise and lucid statement shows the *grounds* of the decision to be much *broader* and very different from what counsel state them to be. Inasmuch as the entire argument of counsel for the Petitioners is directed against and based upon this palpably incorrect representation of the decision of the Circuit Court, we shall be obliged again and again to refer to this foundation error in their argument.

The argument on pages 7 and 8, the reference to real estate corporations with "widely scattered public investors," the pedantic and irrelevant footnotes on p. 7, and the assertion that the decision of the Circuit Court "*pro tanto* repeals Sec. 256" of Chapter X, as heretofore pointed out, are no more than straw men who skulk freely through the protecting verbiage of the Commission's Brief. The debtor is the offspring of an unsuccessful reorganization in 1931, and there are no public "investors widely scattered." They are simply the participants in a former ill-considered "reorganization". They hold, in the form of bonds, certificates attesting their own lucklessness. The securities, are, therefore, not "held by the public," nor is it a case of "widely scattered security holders." *Securities*

*and Exchange Commission* v. *United States Realty & Improvement Co.*, 310 U. S. 434, 445, 446, 447.

Petitioners could not safely present the Court with a financial statement of the debtor, or put before the judge its record and its prospects. The simple and obvious fact is that it was not possible to represent to the District Judge that there was a reasonable possibility of successful reorganization without approaching dangerously close to the boundary between good faith towards and actual fraud upon the District Court.

Beginning on p. 8, the Commission charges certain Circuit Courts with denying the "paramount bankruptcy power" in favor of state proceedings and with making "unjustified assumptions as to the adequacy" of these state proceedings which "Chapter X was intended to supplant." This is not even plausible. Congress did not intend to "supplant" adequate state proceedings, and the Circuit Court in this case made no "unjustified assumption" as to the adequacy thereof. Congress, on the contrary, intended to prevent unnecessary removal of cases from the state courts, and we refer to the report of the House Committee of the Judiciary, No. 1409, 75th Congress, 1st Session, filed July 29, 1937, to accompany H. R. 8046, on this point:

> " 'Good faith' is defined in terms which codify the rules variously laid down by the courts, but not uniformly and at times in conflict. This definition will help toward keeping out proceedings which properly belong under Chapter XI and will stop the removal of prior pending cases from other courts where the interests of creditors and stockholders would be better served by retaining and continuing the prior proceedings."

Congress put the burden to prove the inadequacy of the

state proceeding on the Petitioners, and the Circuit Court found that they had failed to discharge this burden. That Court did *not assume* that state proceeding was adequate; the District Judge *assumed without any evidence that it was inadequate,* and this the Circuit Court held error. The statutes and the decisions of all courts sustain this view. The Petitioners now ask this Court to toss all these prior rulings, as well as the intent of Congress, into the legal ash can.

The suggestion on p. 9 that this Court redefine "good faith" is a request that this Court set aside the will of Congress and overrule the prior decisions of the Court itself. It is an invitation to destroy that minimum certainty in the law which cannot be maintained, if the remaining vestige of the doctrine of *stare decisis* is to be thus thrown away, and we are to adopt the legal practices of Continental Europe. The demand for this "clarification" really involves an almost offensive assumption that this Court is so addlepated that it does not know its legal mind from one term to the next. In the *Marine Harber Properties* case this Court said that the burden to show the inadequacy of the state proceeding was on those who assert it—the Petitioners—and in so saying, the Court simply gave expression to the will of Congress as clearly expressed in the statutes. That this needs any "clarification" to those who can read the English language, is nonsense.

The discussion of Sec. 256 of Chapter X on pages 9, ff. of the Commission Brief again introduces the pet phrase, "race of diligence," which the authors of the argument seem to hold in the highest veneration. Sec. 256 must be read with Secs. 130 and 146. The former is intended to preclude the argument that a prior state proceeding pre-

vents the filing of a petition, while Sec. 130 and especially Sec. 146 (4) make it possible that a state proceeding may be adequate and put the burden on the one denying the adequacy to offer some proof in support of his denial thereof. There is obviously no "race of diligence" or any other kind of a race; each case is governed by its own facts, wholly without regard to time. The fact that the state proceedings is started first affords no advantage; the court must be satisfied of its adequacy, but the burden is cast by the law upon him who goes into the bankrupcy court, on the theory that the state proceeding does not protect him. This is simple; it is well understood; Congress intended it. Why scrap it all now?

On p. 9 of the Commission Brief an attempt is made to persuade this Court to believe that the Circuit Court interpreted certain quoted language in the *Marine Harbor Properties* case as a ruling by the United States Supreme Court that in all cases where but "one class of securities" was involved, "prior proceedings are to take precedence," and that the "consequence is virtually to preclude the availability of Chapter X where only a single class of creditors is substantially interested," and thus (p. 8) "to deny the invocation of the paramount Federal bankruptcy power in favor of the prior state court proceedings." Of course, if we may be permitted to say so, no such argument was made in the Circuit Court, and, to a mind carefully seeking the truth, no such thought is suggested by any statement, phrase or hint in the opinion of that distinguished tribunal

Again and again we call attention to the fact, avoided in the ingeniously confusing argument of counsel for the Commission, that the Circuit Court reversed the District Court because the Petitioners failed to discharge the burden the bankruptcy act lays on them, to allege and prove

certain fundamental facts essential to the power of the Court to take and retain jurisdiction in the face of a challenge duly interposed. The bankruptcy power is only as "paramount" as Congress chooses to make it, and Congress chose not to make it *prima facie* "paramount" so as to exclude state proceedings without a showing of inadequacy.

Otherwise, put, this is not a question of the paramountcy of the bankruptcy power—which is in Congress—but whether Congress granted the District Court a jurisdiction in all circumstances paramount to that of the state courts. This Congress did not do, and this case is, in so far as the stated proceeding is concerned, one where the circumstances did not justify the action of the District Court in approving the petition.

On p. 13 we are told that the courts should have remanded and not ordered a dismissal. Here again counsel do not seem to agree with Congress—Sec. 141 of Chapter X specifically requires a dismissal in this case, since Petitioners failed to show good faith.

The Commission acts as if Petitioners represented substantial holdings. One petitioner, Miss Milis, said she never received any bonds. R. 54. That leaves a balance of about 2% of the total second issue bondholders. While the fact that the Petitioners have only an insubstantial interest may not be of controlling importance, it is persuasive of a fundamental want of equity in their position. Perhaps this explains why counsel in both briefs are driven in innuendoes and imaginings in an effort to cast doubt upon the good faith and fairness of the 98% who do not seem to care to take this simple case into the Federal Court. The Commission and the Petitioners contend for that minority rule

decided by Judge Moscovitz; Commercial Law Jc., Feb. 1945, pp. 31-35.

On p. 13 the astonishing assertion is made that the powers of the state equity courts are no greater "than those in an equity receivership proceeding, the traditional inadequacies of which led to the bankruptcy reorganization statutes." The Illinois statute, Sec. 90 of the Corporation Act of the state (Appendix A), is based on the English Companies Act on reorganization, and the Illinois Supreme Court has held that courts of equity in that state in effect have all the powers of the federal courts in bankruptcy, including control of reorganization committees, of the sale, of the plan, and full power to protect the smallest and most "widely scattered minorities." Appendix B. This assertion in the Commissioner's Brief is strangely at variance with the facts.

On p. 13 we find this statement:

> "While the equitable jurisdiction of the State Courts may afford safeguards against gross abuse in foreclosure suits, their powers are not greater than those in an equity receivership proceeding * * *"

This is the first time that we have been advised that abuses in equity proceedings are classified on the basis of degrees of grossness. We do not believe that any further comment is needed beyond the fact that counsel admit the fact, for a fact it is, that the State Courts have the power to protect against abuse, whether "gross" or otherwise.

On pp. 13 and 14 counsel for the Commission take the position that "type of proceeding" rather than the characteristics of the individual case should, upon being proved, be decisive upon the power of the court to proceed, notwithstanding a prior state proceeding. This, obviously, is

not the test Congress laid down, nor has any such test been suggested in any decision of this Court or of any federal court. Congress and the decisions require that the Petitioner under Chapter X of the Bankruptcy Act allege and prove facts in each case— not a *type* of case— in the District Court which would authorize the court to take and retain jurisdiction over objections duly made.

The discussion and note on p. 14, calculated to show the superiority of Chapter X over any state procedure, lead to the inevitable conclusion that *no* case could possibly exist where a state proceeding would adequately subserve the interests of creditors. It also *assumes* as a premise that the state courts will not do their duty, or are incapable of seeing what their duty is, and, if seeing it, unwilling to perform it. For example, we note that the argument is based on the idea of an "independent trustee." P. 13, note. Such an argument could be advanced in *every* case and if accepted, no case would ever remain in a state court. Congress intended no such result.

We cannot escape the conclusion that, beginning on p. 15, Division II of the Commission Brief, the authors drew more freely on their imagination than upon the record. After purporting to describe the safeguards available under the state procedure, counsel say (p. 16) that the

> "Circuit Court's view of the Illinois law, however, is a very optimistic one and apparently much more advanced than that of the state court itself."

The statements which follow are calculated to minimize the state safeguards. It is respectfully submitted that counsel could not have made these statements and insinuations of record, had they read the state cases and the state statute, Sec. 90. We refer this Court to Appendix B, where the

holdings of the Illinois courts on this subject are fully set forth and where it appears that the Supreme Court is of the opinion that the equity courts in Illinois have substantially *all* the powers of the bankruptcy court in relation to the rights of minorities and their protection.

Most statements on p. 16, whether of law or of fact, are incomplete, inaccurate or contrary to fact. For example, the statute that the power of the state court to fix an upset price relates to a price that "may only be one which is not so grossly inadequate as to shock the conscience of a court of equity"! This brain brat is fathered solely by counsel. The Illinois Court has no responsibility for its parentage. On the contrary, as appears in Appendix B, the Court is said to be the vendor and has full control of the price and complete power and duty to protect the smallest minority. These statements in the brief are gross misrepresentations of the Illinois law.

Plans may be filed at any reasonable time, and the Court has the same control over them as has the federal court.

The "advantages" of Chapter X listed on page 17 are adequately available under the state procedure. The state court has the power to provide an independent trustee or receiver.

### III. Conclusion.

The Petitioners failed to prove a single fact which tended to show that their rights could not be fully protected in the state courts. The burden was on them to show some such fact. In this they failed, and the Court so held and hence dismissed their petition.

The Circuit Court did *not* hold that the state procedure in Illinois was *in all circumstances* as adequate as the federal procedure. It simply held that in *this particular* case Petitioners had failed to sustain the burden of proof that the state procedure did not adequately protect their rights. This holding this Court cannot disturb without upsetting certain fundamentals of established bankruptcy and reorganization procedure.

It is argued that there must be a "realistic" approach to this problem. So there must, and so felt the Circuit Court, for it ordered a dismissal, since no hope of successful reorganization was made to appear or even suggested. Liquidation in a reorganization proceeding seems to have been the object of the Petitioners, bringing the petition within the condemnation of the case of *Fidelity Assurance Association* v. *Sims,* 318 U. S. 608.

The petition for a Writ of Certiorari should be denied.

Respectfully submitted,
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